

INTANGIBLE INCOME MODIFICATIONS

2019 GENERAL SESSION

STATE OF UTAH

LONG TITLE**General Description:**

This bill modifies provisions related to payment of income tax on global intangible low-taxed income.

Highlighted Provisions:

This bill:

- ▶ adds global intangible low-taxed income to the definition of unadjusted income in the Corporate Franchise and Income Taxes code;
- ▶ creates a subtraction from unadjusted income of corporate taxpayers for a percentage of global intangible low-taxed income that parallels the federal deduction; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

This bill provides retrospective operation.

Utah Code Sections Affected:**AMENDS:**

- 59-7-101**, as last amended by Laws of Utah 2018, Second Special Session, Chapters 2 and 3
- 59-7-106**, as last amended by Laws of Utah 2017, Chapter 389

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **59-7-101** is amended to read:

59-7-101. Definitions.

As used in this chapter:

- (1) "Adjusted income" means unadjusted income as modified by Sections 59-7-105 and 59-7-106.

(2) (a) "Affiliated group" means one or more chains of corporations that are connected through stock ownership with a common parent corporation that meet the following requirements:

(i) at least 80% of the stock of each of the corporations in the group, excluding the common parent corporation, is owned by one or more of the other corporations in the group; and

(ii) the common parent directly owns at least 80% of the stock of at least one of the corporations in the group.

(b) "Affiliated group" does not include corporations that are qualified to do business but are not otherwise doing business in this state.

(c) For purposes of this Subsection (2), "stock" does not include nonvoting stock which is limited and preferred as to dividends.

(3) "Apportionable income" means adjusted income less nonbusiness income net of related expenses, to the extent included in adjusted income.

(4) "Apportioned income" means apportionable income multiplied by the apportionment fraction as determined in Section 59-7-311.

(5) "Business income" means the same as that term is defined in Section 59-7-302.

(6) (a) "Captive real estate investment trust" means a real estate investment trust if:

(i) the shares or beneficial interests of the real estate investment trust are not regularly traded on an established securities market; and

(ii) more than 50% of the voting power or value of the shares or beneficial interests of the real estate investment trust are directly, indirectly, or constructively:

(A) owned by a controlling entity of the real estate investment trust; or

(B) controlled by a controlling entity of the real estate investment trust.

(b) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the commission may make rules defining "established securities market."

(7) (a) "Common ownership" means the direct or indirect control or ownership of more than 50% of the outstanding voting stock of:

(i) a parent-subsidary controlled group as defined in Section 1563, Internal Revenue Code, except that 50% shall be substituted for 80%;

(ii) a brother-sister controlled group as defined in Section 1563, Internal Revenue

64 Code; or

65 (iii) three or more corporations each of which is a member of a group of corporations

66 described in Subsection (2)(a)(i) or (ii), and one of which is:

67 (A) a common parent corporation included in a group of corporations described in

68 Subsection (2)(a)(i); and

69 (B) included in a group of corporations described in Subsection (2)(a)(ii).

70 (b) Ownership of outstanding voting stock shall be determined by Section 1563,

71 Internal Revenue Code.

72 (8) (a) "Controlling entity of a captive real estate investment trust" means an entity

73 that:

74 (i) is treated as an association taxable as a corporation under the Internal Revenue

75 Code;

76 (ii) is not exempt from federal income taxation under Section 501(a), Internal Revenue

77 Code; and

78 (iii) directly, indirectly, or constructively holds more than 50% of:

79 (A) the voting power of a captive real estate investment trust; or

80 (B) the value of the shares or beneficial interests of a captive real estate investment

81 trust.

82 (b) "Controlling entity of a captive real estate investment trust" does not include:

83 (i) a real estate investment trust, except for a captive real estate investment trust;

84 (ii) a qualified real estate investment subsidiary described in Section 856(i), Internal

85 Revenue Code, except for a qualified real estate investment trust subsidiary of a captive real

86 estate investment trust; or

87 (iii) a foreign real estate investment trust.

88 (c) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the

89 commission may make rules defining "established securities market."

90 (9) "Corporate return" or "return" includes a combined report.

91 (10) "Corporation" includes:

92 (a) entities defined as corporations under Sections 7701(a) and 7704, Internal Revenue

93 Code; and

94 (b) other organizations that are taxed as corporations for federal income tax purposes

95 under the Internal Revenue Code.

96 (11) "Dividend" means any distribution, including money or other type of property,
97 made by a corporation to its shareholders out of its earnings or profits accumulated after
98 December 31, 1930.

99 (12) (a) "Doing business" includes any transaction in the course of its business by a
100 domestic corporation, or by a foreign corporation qualified to do or doing intrastate business in
101 this state.

102 (b) Except as provided in Subsection 59-7-102(3), "doing business" includes:

103 (i) the right to do business through incorporation or qualification;

104 (ii) the owning, renting, or leasing of real or personal property within this state; and

105 (iii) the participation in joint ventures, working and operating agreements, the
106 performance of which takes place in this state.

107 (13) "Domestic corporation" means a corporation that is incorporated or organized
108 under the laws of this state.

109 (14) (a) "Farmers' cooperative" means an association, corporation, or other
110 organization that is:

111 (i) (A) an association, corporation, or other organization of farmers or fruit growers; or

112 (B) an association, corporation, or other organization that is similar to an association,
113 corporation, or organization described in Subsection (14)(a)(i)(A); and

114 (ii) organized and operated on a cooperative basis to:

115 (A) (I) market the products of members of the cooperative or the products of other
116 producers; and

117 (II) return to the members of the cooperative or other producers the proceeds of sales
118 less necessary marketing expenses on the basis of the quantity of the products of a member or
119 producer or the value of the products of a member or producer; or

120 (B) (I) purchase supplies and equipment for the use of members of the cooperative or
121 other persons; and

122 (II) turn over the supplies and equipment described in Subsection (14)(a)(ii)(B)(I) at
123 actual costs plus necessary expenses to the members of the cooperative or other persons.

124 (b) (i) Subject to Subsection (14)(b)(ii), for purposes of this Subsection (14), the
125 commission by rule, made in accordance with Title 63G, Chapter 3, Utah Administrative

126 Rulemaking Act, shall define:

127 (A) the terms "member" and "producer"; and

128 (B) what constitutes an association, corporation, or other organization that is similar to
129 an association, corporation, or organization described in Subsection (14)(a)(i)(A).

130 (ii) The rules made under this Subsection (14)(b) shall be consistent with the filing
131 requirements under federal law for a farmers' cooperative.

132 (15) "Foreign corporation" means a corporation that is not incorporated or organized
133 under the laws of this state.

134 (16) (a) "Foreign operating company" means a corporation that:

135 (i) is incorporated in the United States;

136 (ii) conducts at least 80% of the corporation's business activity, as determined under
137 Section 59-7-401, outside the United States; and

138 (iii) as calculated in accordance with Part 3, Allocation and Apportionment of Income -
139 Utah UDITPA Provisions, has:

140 (A) at least \$1,000,000 of payroll located outside the United States; and

141 (B) at least \$2,000,000 of property located outside the United States.

142 (b) "Foreign operating company" does not include a corporation that qualifies for the
143 Puerto Rico and possession tax credit as provided in Section 936, Internal Revenue Code.

144 (17) (a) "Foreign real estate investment trust" means:

145 (i) a business entity organized outside the laws of the United States if:

146 (A) at least 75% of the business entity's total asset value at the close of the business
147 entity's taxable year is represented by:

148 (I) real estate assets, as defined in Section 856(c)(5)(B), Internal Revenue Code;

149 (II) cash or cash equivalents; or

150 (III) one or more securities issued or guaranteed by the United States;

151 (B) the business entity is:

152 (I) not subject to income taxation:

153 (Aa) on amounts distributed to the business entity's beneficial owners; and

154 (Bb) in the jurisdiction in which the business entity is organized; or

155 (II) exempt from income taxation on an entity level in the jurisdiction in which the
156 business entity is organized;

(C) the business entity distributes at least 85% of the business entity's taxable income, as computed in the jurisdiction in which the business entity is organized, to the holders of the business entity's:

(I) shares or beneficial interests; and

(II) on an annual basis;

(D) (I) not more than 10% of the following is held directly, indirectly, or constructively by a single person:

(Aa) the voting power of the business entity; or

(Bb) the value of the shares or beneficial interests of the business entity; or

(II) the shares of the business entity are regularly traded on an established securities market; and

(E) the business entity is organized in a country that has a tax treaty with the United States; or

(ii) a listed Australian property trust.

(b) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the commission may make rules defining:

(i) "cash or cash equivalents";

(ii) "established securities market"; or

(iii) "listed Australian property trust."

(18) "Income" includes losses.

(19) "Internal Revenue Code" means Title 26 of the United States Code as effective during the year in which Utah taxable income is determined.

(20) "Nonbusiness income" means the same as that term is defined in Section 59-7-302.

(21) "Real estate investment trust" means the same as that term is defined in Section 856, Internal Revenue Code.

(22) "Related expenses" means:

(a) expenses directly attributable to nonbusiness income; and

(b) the portion of interest or other expense indirectly attributable to both nonbusiness and business income that bears the same ratio to the aggregate amount of such interest or other expense, determined without regard to this Subsection (22), as the average amount of the asset

producing the nonbusiness income bears to the average amount of all assets of the taxpayer within the taxable year.

(23) "S corporation" means an S corporation as defined in Section 1361, Internal Revenue Code.

(24) "Safe harbor lease" means a lease that qualified as a safe harbor lease under Section 168, Internal Revenue Code.

(25) "State of the United States" includes any of the 50 states or the District of Columbia.

(26) (a) "Taxable year" means the calendar year or the fiscal year ending during such calendar year upon the basis of which the adjusted income is computed.

(b) In the case of a return made for a fractional part of a year under this chapter or under rules prescribed by the commission, "taxable year" includes the period for which such return is made.

(27) "Taxpayer" means any corporation subject to the tax imposed by this chapter.

(28) "Threshold level of business activity" means business activity in the United States equal to or greater than 20% of the corporation's total business activity as determined under Section 59-7-401.

(29) (a) "Unadjusted income" means federal taxable income as determined on a separate return basis before intercompany eliminations as determined by the Internal Revenue Code, before the net operating loss deduction and special deductions for dividends received.

(b) For the last taxable year of a taxpayer beginning on or before December 31, 2017, "unadjusted income" includes deferred foreign income described in Section 965(a), Internal Revenue Code.

(c) "Unadjusted income" includes global intangible low-taxed income described in Section 951A, Internal Revenue Code.

(30) (a) "Unitary group" means a group of corporations that:

(i) are related through common ownership; and

(ii) by a preponderance of the evidence as determined by a court of competent jurisdiction or the commission, are economically interdependent with one another as demonstrated by the following factors:

(A) centralized management;

- 219 (B) functional integration; and
- 220 (C) economies of scale.
- 221 (b) "Unitary group" includes a captive real estate investment trust.
- 222 (c) "Unitary group" does not include an S corporation.
- 223 (31) "United States" includes the 50 states and the District of Columbia.
- 224 (32) "Utah net loss" means the current year Utah taxable income before Utah net loss
- 225 deduction, if determined to be less than zero.
- 226 (33) "Utah net loss deduction" means the amount of Utah net losses from other taxable
- 227 years that a taxpayer may carry forward to the current taxable year in accordance with Section
- 228 59-7-110.
- 229 (34) (a) "Utah taxable income" means Utah taxable income before net loss deduction
- 230 less Utah net loss deduction.
- 231 (b) "Utah taxable income" includes income from tangible or intangible property located
- 232 or having situs in this state, regardless of whether carried on in intrastate, interstate, or foreign
- 233 commerce.
- 234 (35) "Utah taxable income before net loss deduction" means apportioned income plus
- 235 nonbusiness income allocable to Utah net of related expenses.
- 236 (36) (a) "Water's edge combined report" means a report combining the income and
- 237 activities of:
- 238 (i) all members of a unitary group that are:
- 239 (A) corporations organized or incorporated in the United States, including those
- 240 corporations qualifying for the Puerto Rico and Possession Tax Credit as provided in Section
- 241 936, Internal Revenue Code, in accordance with Subsection (36)(b); and
- 242 (B) corporations organized or incorporated outside of the United States meeting the
- 243 threshold level of business activity; and
- 244 (ii) an affiliated group electing to file a water's edge combined report under Subsection
- 245 59-7-402(2).
- 246 (b) There is a rebuttable presumption that a corporation which qualifies for the Puerto
- 247 Rico and possession tax credit provided in Section 936, Internal Revenue Code, is part of a
- 248 unitary group.
- 249 (37) "Worldwide combined report" means the combination of the income and activities

of all members of a unitary group irrespective of the country in which the corporations are incorporated or conduct business activity.

Section 2. Section **59-7-106** is amended to read:

59-7-106. Subtractions from unadjusted income.

(1) In computing adjusted income, the following amounts shall be subtracted from unadjusted income:

(a) the foreign dividend gross-up included in gross income for federal income tax purposes under Section 78, Internal Revenue Code;

(b) subject to Subsection (2), the net capital loss, as defined for federal purposes, if the taxpayer elects to deduct the net capital loss on the return filed under this chapter for the taxable year for which the net capital loss is incurred;

(c) the decrease in salary expense deduction for federal income tax purposes due to claiming the federal work opportunity credit under Section 51, Internal Revenue Code;

(d) the decrease in qualified research and basic research expense deduction for federal income tax purposes due to claiming the federal credit for increasing research activities under Section 41, Internal Revenue Code;

(e) the decrease in qualified clinical testing expense deduction for federal income tax purposes due to claiming the federal credit for clinical testing expenses for certain drugs for rare diseases or conditions under Section 45C, Internal Revenue Code;

(f) any decrease in any expense deduction for federal income tax purposes due to claiming any other federal credit;

(g) the safe harbor lease adjustment required under Subsections 59-7-111(1)(b) and (2)(b);

(h) any income on the federal corporation income tax return that has been previously taxed by Utah;

(i) an amount included in federal taxable income that is due to a refund of a tax, including a franchise tax, an income tax, a corporate stock and business tax, or an occupation tax:

(i) if that tax is imposed for the privilege of:

(A) doing business; or

(B) exercising a corporate franchise;

- 281 (ii) if that tax is paid by the corporation to:
- 282 (A) Utah;
- 283 (B) another state of the United States;
- 284 (C) a foreign country;
- 285 (D) a United States possession; or
- 286 (E) the Commonwealth of Puerto Rico; and
- 287 (iii) to the extent that tax was added to unadjusted income under Section 59-7-105;
- 288 (j) a charitable contribution, to the extent the charitable contribution is allowed as a
- 289 subtraction under Section 59-7-109;
- 290 (k) subject to Subsection (3), 50% of a dividend considered to be received or received
- 291 from a subsidiary that:
- 292 (i) is a member of the unitary group;
- 293 (ii) is organized or incorporated outside of the United States; and
- 294 (iii) is not included in a combined report under Section 59-7-402 or 59-7-403;
- 295 (l) subject to Subsection (4) and Section 59-7-401, 50% of the adjusted income of a
- 296 foreign operating company;
- 297 (m) the amount of gain or loss that is included in unadjusted income but not recognized
- 298 for federal purposes on stock sold or exchanged by a member of a selling consolidated group as
- 299 defined in Section 338, Internal Revenue Code, if an election has been made in accordance
- 300 with Section 338(h)(10), Internal Revenue Code;
- 301 (n) the amount of gain or loss that is included in unadjusted income but not recognized
- 302 for federal purposes on stock sold, exchanged, or distributed by a corporation in accordance
- 303 with Section 336(e), Internal Revenue Code, if an election under Section 336(e), Internal
- 304 Revenue Code, has been made for federal purposes;
- 305 (o) subject to Subsection (5), an adjustment to the following due to a difference
- 306 between basis for federal purposes and basis as computed under Section 59-7-107:
- 307 (i) an amortization expense;
- 308 (ii) a depreciation expense;
- 309 (iii) a gain;
- 310 (iv) a loss; or
- 311 (v) an item similar to Subsections (1)(o)(i) through (iv);

(p) an interest expense that is not deducted on a federal corporation income tax return under Section 265(b) or 291(e), Internal Revenue Code;

(q) 100% of dividends received from a subsidiary that is an insurance company if that subsidiary that is an insurance company is:

(i) exempt from this chapter under Subsection 59-7-102(1)(c); and

(ii) under common ownership;

(r) subject to Subsection 59-7-105(10), for a corporation that is an account owner as defined in Section 53B-8a-102, the amount of a qualified investment as defined in Section 53B-8a-102.5:

(i) that the corporation or a person other than the corporation makes into an account owned by the corporation during the taxable year;

(ii) to the extent that neither the corporation nor the person other than the corporation described in Subsection (1)(r)(i) deducts the qualified investment on a federal income tax return; and

(iii) to the extent the qualified investment does not exceed the maximum amount of the qualified investment that may be subtracted from unadjusted income for a taxable year in accordance with Subsection 53B-8a-106(1);

(s) for a corporation that makes a donation, as that term is defined in Section 53B-8a-201, to the Student Prosperity Savings Program created in Section 53B-8a-202, the amount of the donation to the extent that the corporation did not deduct the donation on a federal income tax return;

(t) for purposes of income included in a combined report under Part 4, Combined Reporting, the entire amount of the dividends a member of a unitary group receives or is considered to receive from a captive real estate investment trust; ~~and~~

(u) the increase in income for federal income tax purposes due to claiming a:

(i) qualified tax credit bond credit under Section 54A, Internal Revenue Code; or

(ii) qualified zone academy bond under Section 1397E, Internal Revenue Code[-]; and

(v) subject to Subsection (6), for global intangible low-taxed income described in Section 951A, Internal Revenue Code, the amount calculated by multiplying:

(i) the percentage described in Section 250, Internal Revenue Code, for global intangible low-taxed income for the applicable taxable year; and

(ii) the amount of global intangible low-taxed income:

(A) that is included in unadjusted income; and

(B) for which a deduction under Section 250, Internal Revenue Code, has not been included in unadjusted income.

(2) For purposes of Subsection (1)(b):

(a) the subtraction shall be made by claiming the subtraction on a return filed:

(i) under this chapter for the taxable year for which the net capital loss is incurred; and

(ii) by the due date of the return, including extensions; and

(b) a net capital loss for a taxable year shall be:

(i) subtracted for the taxable year for which the net capital loss is incurred; or

(ii) carried forward as provided in Sections 1212(a)(1)(B) and (C), Internal Revenue Code.

(3)(a) For purposes of the subtraction described in Subsection (1)(k), global intangible low-taxed income described in Section 951A, Internal Revenue Code, is not a dividend considered to be received or received.

~~[(3)-(a)]~~ (b) For purposes of calculating the subtraction ~~[provided for]~~ described in Subsection (1)(k), a taxpayer shall first subtract from a dividend considered to be received or received an expense directly attributable to that dividend.

~~[(b)]~~ (c) For purposes of Subsection (3)~~[(a)]~~(b), the amount of an interest expense that is considered to be directly attributable to a dividend is calculated by multiplying the interest expense by a fraction:

(i) the numerator of which is the taxpayer's average investment in the dividend paying subsidiaries; and

(ii) the denominator of which is the taxpayer's average total investment in assets.

~~[(c)]~~ (d) (i) For purposes of calculating the subtraction allowed by Subsection (1)(k), in determining income apportionable to this state, a portion of the factors of a foreign subsidiary that has dividends that are partially subtracted under Subsection (1)(k) shall be included in the combined report factors as provided in this Subsection (3)~~[(c)]~~(d).

(ii) For purposes of Subsection (3)~~[(c)]~~(d)(i), the portion of the factors of a foreign subsidiary that has dividends that are partially subtracted under Subsection (1)(k) that shall be included in the combined report factors is calculated by multiplying each factor of the foreign

374 subsidiary by a fraction:

375 (A) not to exceed 100%; and

376 (B) (I) the numerator of which is the amount of the dividend paid by the foreign
377 subsidiary that is included in adjusted income; and

378 (II) the denominator of which is the current year earnings and profits of the foreign
379 subsidiary as determined under the Internal Revenue Code.

380 (4) (a) For purposes of Subsection (1)(l), a taxpayer may not make a subtraction under
381 Subsection (1)(l):

382 (i) if the taxpayer elects to file a worldwide combined report as provided in Section
383 59-7-403; or

384 (ii) for the following:

385 (A) income generated from intangible property; or

386 (B) a capital gain, dividend, interest, rent, royalty, or other similar item that is
387 generated from an asset held for investment and not from a regular business trading activity.

388 (b) In calculating the subtraction provided for in Subsection (1)(l), a foreign operating
389 company:

390 (i) may not subtract an amount provided for in Subsection (1)(k) or (l); and

391 (ii) prior to determining the subtraction under Subsection (1)(l), shall eliminate a
392 transaction that occurs between members of a unitary group.

393 (c) For purposes of the subtraction provided for in Subsection (1)(l), in determining
394 income apportionable to this state, the factors for a foreign operating company shall be
395 included in the combined report factors in the same percentages as the foreign operating
396 company's adjusted income is included in the combined adjusted income.

397 (d) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the
398 commission may by rule define what constitutes:

399 (i) income generated from intangible property; or

400 (ii) a capital gain, dividend, interest, rent, royalty, or other similar item that is
401 generated from an asset held for investment and not from a regular business trading activity.

402 (5) (a) For purposes of the subtraction provided for in Subsection (1)(o), the amount of
403 a reduction in basis shall be allowed as an expense for the taxable year in which a federal tax
404 credit is claimed if:

(i) there is a reduction in federal basis for a federal tax credit; and

(ii) there is no corresponding tax credit allowed in this state.

(b) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the commission may by rule define what constitutes an item similar to Subsections (1)(o)(i) through (iv).

(6) (a) For purposes of calculating the subtraction allowed under Subsection (1)(v), in determining income apportionable to this state, a portion of the factors of a foreign subsidiary that has global intangible low-taxed income that is partially subtracted under Subsection (1)(v) shall be included in the combined report factors as provided in this Subsection (6).

(b) For purposes of Subsection (6)(a), the portion of the factors of a foreign subsidiary that has global intangible low-taxed income that is partially subtracted under Subsection (1)(v) that shall be included in the combined report factors is calculated by multiplying each factor of the foreign subsidiary by a fraction:

(i) not to exceed 100%; and

(ii) (A) the numerator of which is the amount of the global intangible low-taxed income paid by the foreign subsidiary that is included in adjusted income; and

(B) the denominator of which is the current year earnings and profits of the foreign subsidiary as determined under the Internal Revenue Code.

Section 3. Retrospective operation.

This bill has retrospective operation for a taxable year beginning on or after January 1, 2019.